No. 10052

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD and FRED HOWARD,

Appellees.

APPELLEES' BRIEF.

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Statement of Pleadings and Jurisdiction.

On May 26, 1941, appellees filed their petition in the United States District Court under Sec. 75 of the Bankruptcy Act, seeking a composition or an extension of time to pay debts, and other relief under said Act. [Tr. pp. 2-5.]

On November 6, 1941, application for confirmation was filed in the District Court. [Tr. pp. 7-9.] Conciliation Commissioner's certificate dated October 22, 1941, was filed in the District Court on November 6, 1941. [Tr. pp. 9-10.] Notice of motion to confirm was filed on November 6, 1941. [Tr. p. 11.] Hearing on motion to confirm was set for November 24, 1941. [Tr. p. 11.]

November 18, 1941, affidavit of Paul Leiter was filed in the District Court, setting out time of first meeting of creditors, consent of majority in number of creditors to a composition, and filing by appellees of application for confirmation of composition on or about November 9, 1941. (This was typographical error; record shows filing was on November 6, 1941.) Order of Court waiving three month period required under Rule 50 of the Supreme Court filed. [Tr. p. 25.]

On November 17, 1941, appellant filed her petition for leave to proceed with an action commenced in the Superior Court of the State of California, affecting certain property rights owned, and in the possession of appellee farmers. [Tr. pp. 12-17.] Prayer was for order to issue against appellees and their attorney to show cause on November 24, 1941, why order should not be made granting appellant the right to proceed in the State Court. [Tr. p. 18.]

An order to show cause issued, requiring appellees and their attorney to show cause why leave to proceed in State Court should not be granted, which ordered that service be made on debtors and their attorney not less than three days prior to date of hearing. [Tr. p. 20.] (Would that mean personal service?) No personal service was had on appellees, or any service whatsoever, prior to the hearing on the order to show cause. [Tr. p. 21.] Appellees knew nothing of hearing and could not interpose answer to the petition, as her attorney could not locate them in time. [Tr. pp. 49-50.]

Appellant's petition for leave to proceed in State Court, came on for hearing [Tr. p. 26]; Court made its order continuing the automatic stay imposed, upon filing of the petition under Section 75, *without prejudice to the assertion of the rights set forth in the petition* of appellant, and referred the petition to the Conciliation Commissioner with plenary power and with authority to proceed to hear and determine the issues presented by said petition, subject to review by the District Court. [Tr. pp. 31-32.]

On January 8, 1942, notice of appeal from portions of order and judgment was filed in District Court [Tr. p. 33], and undertaking for costs on appeal approved and filed. [Tr. pp. 34-36.] On January 17, 1942, designation by appellant of points on which she intended to rely on appeal, was served and filed. [Tr. pp. 37-41.] On same date designation by appellant of papers and matters to be included in record on appeal was served and filed. [Tr. pp. 37-41.] On same date designation by appellant of papers and matters to be included in record on appeal was served and filed [Tr. pp. 41-43]; certificate of clerk of District Court. [Tr. pp. 43-44.]

Reporter's transcript [Tr. pp. 45-70]; transcript of record filed with clerk of this Court February 16, 1942. [Tr. pp. 71-72.] Appeal taken under Section 24a of the Bankruptcy Laws as amended in 1938 and 1939; also within the time fixed by Section 25.

Questions Involved.

1. Did the Court err in denying prayer of appellant's petition and continuing the restraint automatically imposed by the filing under Sec. 75; and referring said petition to the Conciliation Commissioner, with plenary power and authority to proceed to hear and determine the issues presented by said petition, subject to review?

2. Did appellant comply with requirements of Sec. 75 (o) which requires hearing and report by Conciliation Commissioner, before proceeding further with action in State Court?

3. Does appellees' claim to ownership and right to use water for farm and domestic purposes come within meaning of "property", within the meaning of Subdivisions 1-6, Subparagraphs (o)?

Statement of Case.

Appellees are the owners of and in possession of 40 acres of land, on which they raise turkeys, chickens, and grow fruit trees and vegetables for family consumption [Tr. p. 3], together with the possession of and right to use all water necessary for domestic as well as agricultural purposes, from a certain pipe line running across their land, which carries water from certain springs. [Tr. pp. 14-15.] Appellees filed petition under Sec. 75 of the Bankruptcy Act, secured consent of creditors to offer of composition and filed application with the District Court for confirmation. [Tr. p. 11.] On November 24, 1941, appellant asked leave of Court to proceed with the trial instituted in the State Court of her suit to quiet title to the use of water flowing in a pipe line, claimed by, and in possession of appellees, to recover money damages suffered by reason of appellees' use, possession and claim of ownership, and for injunction, to restrain appellees from further using, owning, possessing, or exercising use, ownership or possession of said water right, on the grounds that said suit was instituted in the State Court prior to the filing of appellees' petition under Sec. 75 of the Bankruptcy Act, and that leave should be granted appellant to continue with the completion of the State Court action.

Appellees were not served with a copy of said petition [Tr. p. 48], hence knew nothing of the petition, and no answer thereto was filed. A denial of all facts alleged in

the petition were made and entered orally. [Tr. p. 65.] During the trial of the action in the State Court, *but before judgment,* appellees filed under Sec. 75 of the Bankruptcy Act. Paul Leiter, their attorney, appeared in the State Court and notified it to that effect. Thereupon the Court advised Mr. Clark, attorney for appellant, to check into the law, to see if there were any means of securing a transfer back to the State Court for trial, and that he would continue the matter from time to time, in his court, in order to make certain that if and when it was sent back to the State Court, he would hear the case. He also told Mr. Clark that if it took a day, if it took a month, if it took a year, he wanted to hear the matter, and that he would not only render judgment for appellant, but would permit Mr. Clark, the attorney for appellant, the right to amend her complaint to ask for more damages, and that he would allow more money damages. [Tr. p. 66.] This was one of the reasons the Court refused to exercise its discretion to permit the State Court to try the matter. [Tr. pp. 60-61.]

ARGUMENT.

I.

The Court Did Not Err in Denying Prayer of Appellant's Petition and Continuing in Force the Automatic Restraint; Referring Said Petition to Conciliation Commissioner With Plenary Power and With Authority to Proceed to Hear and Determine the Issues Presented by Said Petition.

A. Exclusive Jurisdiction of Appellees and Their Property Is in the Bankruptcy Court.

Sec. 75 (11 U. S. C. A. Sec. 203) (n) provides:

> "The filing of a petition . . . shall immediately *subject the farmer and all his property wherever located, for all purposes of this section to the exclusive jurisdiction of the court . . .*" (Italics ours.)

Sec. 75, Sub. (o) of the Bankruptcy Act, amended August 28, 1935, provides:

> "Except upon petition made to and granted by the judge *after hearing and report by the conciliation commissioner,* the following proceedings . . . if instituted at any time prior to the filing of a petition under this section shall not be maintained in any court or otherwise." (Italics ours.)

The case of *Security-First National Bank of L. A. v. Superior Court in and for Imperial County,* 12 Cal. App. (2d) 140 (1936), held:

> *"The Federal Court has exclusive jurisdiction of person and property* of one petitioning for agricul-

tural composition under this section *until such proceedings is terminated.*" (Italics ours.)

To same effect:

In re Duffy, Ill., 1934, 9 F. Supp. 166;

In re O'Brien, C. C. A., C. Y., 1935, 78 F. (2d) 715;

In re Brown, D. C. Iowa, 1938, 21 F. Supp. 935.

The case of *In re Brown, supra,* answers the argument raised in appellant's brief as to jurisdiction. Debtor (Brown) filed petition under 75 Bankruptcy Act; Lena (wife) moved to dismiss on grounds a divorce action was instituted by her in State Court prior to 75 proceeding and that on the same day the State Court granted her judgment in divorce and gave title to the farm to her, debtor filed under Section 75 of the Bankruptcy Act.

The wife contended divorce decree was in force prior to institution of 75 proceedings in the District Court, and that Court was without jurisdiction over the property. Debtor contended his petition under Section 75, filed after decree rendered, was, nevertheless prior to entry in judgment book of said judgment. The Court held:

> *"It is not necessary to determine question whether State Court granting wife property* before filing by debtor, would divest Federal Court of jurisdiction. The record shows debtor still has some property right in and to the *real property as he is in possession of the land."* (Italics ours.)

And, further in the same case, the Court stated:

> "Questions as to ownership, title and the like, are of relatively small importance in these proceedings, if

they are instituted in good faith for a composition proposal, as the act itself is very definite that immediately upon filing petition in bankruptcy court, jurisdiction over that property immediately vests in this court and no further proceedings can be had by any other court, state or federal, pending the determination of the question of whether debtor can offer a composition proposal that would be acceptable and not interfere with vested and constitutional rights of creditors and secure the requisite number and amount of creditors to approve same."

Section 75, Bankruptcy Act (p), reads:

"The prohibitions of sub. (o) shall apply to all *judicial proceedings in any court* . . . and shall apply . . . *to all of debtor's property,* wherever located. *All such property shall be under the sole jurisdiction and control of the court in bankruptcy.*" (Italics ours.)

And it was held in *In re Walsh,* 18 F. Supp. 762, that:

"The sale of debtor's real property under judgment recovered more than four months prior to the filing of a petition for composition under sec. 75, was held enjoinable by the bankruptcy court."

And in the case of *In re Bradford,* 77 F. (2d) 992, the Court said:

"Where Congress has lawfully vested Federal Courts with power to assume exclusive jurisdiction over given controversies, jurisdiction of state courts must yield to that of federal courts wherever exercised."

Kalb v. Feuerstein, 60 S. Ct. 343, 308 U. S. 433, decided January 2, 1940, settles the question of jurisdiction in so far as hearings on Frazier Laemke proceedings are concerned Mr. Justice Black, delivering the opinion of the Supreme Court, said:

> "Appellants are farmers. Appellees, as mortgagees, foreclosed property and bought in at the sale. Appellant filed under Sec. 75 before sale was confirmed by State Court, and while under said section, the State Court confirmed the sale previously held. No stay was sought from the bankruptcy court or from the state court. Mortgagor (debtor) claimed Sec. 75 was self-executing, that is, 'that it requires no application to the state or federal court in which foreclosure proceedings are pending for a stay': in other words, *that it provides for a statutory and not for a judicial stay.*" (Italics ours.)

The State Court decided the statute did not itself as an automatic statutory stay terminate the State Court's jurisdiction when the farmer filed his petition in the bankruptcy court. The Supreme Court held:

> "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is thereafter not subject to collateral attack. But Congress because its powers over the subject of bankruptcy is plenary, may, by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally.
>
> "The states cannot, in the exercise of control over local laws and practice, vest State Courts with power to violate the Supreme law of the land. The con-

stitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or Federal can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress has vested in the bankruptcy courts exclusive jurisdiction over farmer debtors and their porperty, and has by its act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the Supreme law of the land, which all courts, state and federal, must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone."

The Court gives an exhaustive explanation of (n), (o), and (p) of the Act as well as what was the intent of Congress, and the purpose as set out in the House Judiciary Committee's Report, and then concludes with the following:

"Because that State court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of . . . a deed . . . assistance . . . ejectment of appellants from their property, were all without authority of law . . . Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer . . . and considerations as to whether the issue of jurisdiction was actually contested in the County court, or whether it would have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this act."

B. The Conciliation Commissioner Has the Right to Act as the Court in the First Instance.

A conciliation commissioner, to whom a petition by a farmer for a composition or extension is referred, has authority prior to an adjudication of bankruptcy to act as the court, in the first instance and subject to review, in controlling the property of the debtor in the best interests of the farmer and his creditors.

Adair v. Bank of America (Calif.), 303 U. S. 350.

Section 75 of the Bankruptcy Act provides opportunities for the rehabilitation of farmers. In order to further carry out the provisions of Sec. 75, the statute provides in Subsections (e) and (n) for the exercise by the Court of "such control over the property of the farmer as the Court deems in the best interests of the farmer and creditor." Subsection (a) provides the bankruptcy court may appoint one or more *referees to be known as conciliation commissioners.*

Subsections (a)-(r) inclusive, make provisions for conciliation commissioners, set up the same qualifications as are required for eligibility to the office of referee, authorize the conciliation commissioner to receive and transmit the petitions, call the first meetings of creditors, supervise the farmer's affairs and do any thing and matter in the administration of the debtor's estate the same as any referee could do in any bankruptcy proceeding.

In fact, Subsection (a) specifically states the conciliation commissioner is in reality a *referee* with another title, *i. e.,* "every court of bankruptcy . . . shall appoint *one or more referees* to be known as conciliation commissioners . . ."

In accordance with Subsection (b), the United States Supreme Court on April 24, 1933 established Rule L to govern proceedings under Section 75 (a)-(r) inclusive, as an addition to the general orders in bankruptcy.

Subsection 11 of Rule L provides:

> "Insofar as is consistent with the provisions of section 75 and of this general order, the Conciliation Commissioner *shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to all proceedings under said section.*" (Italics ours.)

Adair v. Bank of America, supra, Mr. Justice Reed, writing the opinion for the Court said, in part:

> "The Commissioner was given insofar as is consistent with the Section 75 and Rule L *'all the powers and duties of a referee in bankruptcy',* to be carried out under the General Orders in Bankruptcy.
>
> Sections 38 and 39 of the Bankruptcy Act and subsections 3 and 6 of Rule L indicate the wide extent of the authority of the conciliation commissioner."

Section 38 of the Bankruptcy Act provides:

> *"Jurisdiction of Referees.* Referees respectively are hereby invested, subject always to a review by

> the judge, to (1) *consider all petitions referred* to them . . . (4) *perform such part of the duties* except as to questions arising out of the applications of bankrupts for compositions or discharges as are by this act *conferred on courts of bankruptcy, and we shall be prescribed by rules or orders of the courts of bankruptcy.*"

Sec. 39 of the Bankruptcy Act specifies the duties of a referee as follows:

> "Referees shall (1) . . . (5) *make up records embodying the evidence.*"

The conciliation commissioner has authority prior to adjudication under 75 (s) *to act as the Court* in the first instance and subject to review in controlling the property in the best interests of the debtor and his creditors. *The conciliation commissioner, like the referee, exercises some of the "judicial authority" of the bankruptcy court.*

> *In re Weidmer,* 82 F. (2d) 566;
> *Adair v. Bank of America, supra;*
> *White v. Schloer,* 178 U. S. 542, 546;
> *Mueller v. Nugent,* 184 U. S. 1, 13.

Under General Order 50, a conciliation commissioner has the same powers and duties as a referee in bankruptcy except where there is a conflict with provisions of the act or the order.

> *In re Miller,* 111 F. (2d) 28, decided 1940, conforming to mandate *Miller v. Hatfield,* 1940, 60 S. Ct. 102, 309 U. S. 1.

To same effect:

Donald v. Bankers Life Co., 107 F. (2d) 810;
In re Brill, D. C. Cal., 1939, 28 F. Supp. 304.

If the petition of appellant had been filed with the conciliation commissioner in the first instance he would have the power and jurisdiction to adjudicate the matters therein contained. In addition to the authorities hereinbefore cited, we have a reference by the District Court judge, who is the presiding officer of the court of bankruptcy, referring the matter to the conciliation commissioner with plenary power to hear and determine the matter contained in the petition; appellant cannot question the right of a judge of the District Court referring a bankruptcy matter to a referee, instead of hearing it *ab initio. Donald v. Bankers Life, supra,* decided in 1939, is interesting on this point. It is there said:

> "The fact that section designates the conciliation commissioner as referee before whom estate in farmer debtor proceeding will be administered if admistration becomes necessary, neither invests the conciliation commissioner with any greater authority than is conferred upon the court nor takes from the judge the primary control over the proceedings vested in him as its presiding officer."

II.

Appellant Did Not Comply With the Requirements of Section 75 of the Bankruptcy Act (o) Which Requires Hearing and Report by Conciliation Commissioner, Before Proceeding Further With Action.

Appellant in her brief, page 10, cites the case of *In re Wogstad,* 10 F. Supp. 349. The following appears on page 351:

> "Even if court determines respondent is entitled to the rights he asserts, the court cannot do anything until after the report of the commissioner. This construction would seem to be the only way in which effect can be given to all provisions of 203 of the Bankruptcy Act."

Inasmuch as it is a District Court of Wyoming case, the interpretation of the section is not entitled to any greater weight than the interpretation placed upon it by our Court.

A different situation is presented in the *McFarland* case, 112 F. (2d) 349, cited by the appellant. It seems to the writer that the learned trial court in analyzing the decision of this Court correctly stated the law of the case to be that the phrase "except upon petition made and granted after hearing and report by conciliation commissioner" referred to a "hearing and report" on the matter contained in the petition, rather than meaning "after hearing and report of composition and acceptance of composition". [Tr. pp. 52-57.] We ask the Court's indulgence to permit us to adopt the lower court's analysis of the *McFarland* case, as our analysis.

> In the McFarland case there was no objection urged by anyone to the court making the order that

it made, while in the case at bar, there is an objection made, and therefore the question of jurisdiction was properly decided, that it had power to make the order. Judge Wilbur throws a good deal of light on the problem in his concurring opinion, wherein he cites the case of Union Joint Stock Land Bank v. Byerly. Judge Wilbur says he concurs in the conclusion reached. I believe, however, that the phrase in sub. (o) of Sec. 75, quoted in the main opinion refers to a hearing and report by the conciliation commissioner upon the petition for leave to enforce a lien upon the property of the farmer.

The lower court held, that under the McFarland case, the proper method, if petition is properly filed under Sec. 75 a-r, is to divest the State Court, or any other court of authority over the res and transfer it to the court of the conciliation commissioner and that all matters are to be adjudicated and determined in that forum, subject to review by the judge of the court. That was the view I suggested I thought would be the proper course to take, and I think that view is strengthened by Judge Wilbur's concurring opinion. [Tr. p. 53.]

"The only point before this Court in the *McFarland* case was the question as to whether or not the lower court had erred in assuming jurisdiction to make the order which it did, permitting the sale. The record shows they all acquiesced in the hearing, shows there was no dissent and no objection to the procedure. The only question was one of jurisdiction, whether the Court had power to do it under the statute. That was the question decided." Are not the reasons set out by the majority judges in reaching their decision pure dicta? Should not as much weight be given to the concurring judge's reasons as to

those of the majority judges. "THERE IS NO DISSENT" TO THE DECISION. The Honorable Justices of this Court "agree the judgment should be affirmed that the Court had jurisdiction to do what it did. In analyzing the case, Judge Wilbur says he does not agree with his associates that the power of the Court was the action of the judge. He says the Court had a greater power than that if it sought to exercise, which it did not seek to exercise in the *McFarland* case. 'As stated in the main opinion, the appellant consented to a hearing of the application by the Court before the hearing on the confirmation of the proposal for composition and extension. Appellant did not object to the hearing of the application of the appellee for leave to sell upon the ground that a prior hearing before the conciliation commissioner was necessary.'" The entire court acquiesced. "There was no affirmative opposition interposed by anyone in the lower court to what it was doing but they questioned the power of the court to do anything at all." It is because of that situation that "Judge Wilbur says: 'Not having made the point in the court below he cannot make it in this court.'"

"Under the *McFarland* decision, appellant bases her right to demand the lower court grant leave to proceed to hear and determine the matter in the State Court. If that is what the decision says, then as a corollary it has the right to say that instead of proceeding in State Court, we will proceed in this Court, particularly since conciliation commissioner's certificate says there is in dispute, in abeyance, the determination of a right of way over this property for pipe line purposes."

III.

Appellees' Claim to Ownership and Right to Use Water Is Property Within the Purview of Subdivisions 1-6 of Section 75, Sub. (o).

In the case of *Hoyd v. City Bank of Albany Co.*, 89 F. (2d) 105, the Court was called upon to determine what was meant by the use of the term "property" as that word was used in Section 75 (n) and (o), and said, at bottom of page 107:

> "The term property is not defined in the enactment. It is unlimited by any qualifying phrase and doubtless was used in its ordinary sense as interpreted in the various decisions of the Federal and State courts. Property is a nomen generalissimum and extends to every species of valuable right and interest including real and personal property, easements, franchises, and other incorporeal hereditaments."

And the case of *In re Brown, supra,* cited as authority under Point I of appellees' brief, quotes from the *Hoyd* case and adopts the interpretation of property as used therein in its opinion.

The case of *Lucas v. Schneider,* 47 F. (2d) 1006, at page 1008, defines property as follows:

> "The term 'property' standing alone includes everything that is the subject of ownership. It is a nomen generalisimum, extending to every species of valuable right and interest. Scranton v. Wheeler, 179 U. S. 141, 170."

Appellees' use and possession for domestic and farming purposes of the water flowing through the pipe over their land, is an incorporeal hereditament; that being so,

it is within the purview of the authorities cited under this point.

Appellant contends the State Court action is for trespass, and not under Sub. (o)'s inhibitions. She has admitted in [Tr. p. 37] her brief and transcript the action is for quieting title, and trespass. Under the authorities herein, it is difficult to imagine appellant's action not within Sub. (o).

IV.

Appellant's Points and Authorities Are Contrary to the Evidence and the Facts of the Case.

We shall answer the points in appellant's argument in the same order that she presents them in her brief. Thus we believe we will facilitate the consideration of this case by this Court. A lengthy reply is not necessary. The issues raised and determined, in the lower court are clear.

V.

Reply to Appellant's Argument, Point I, Page 10 of Her Brief. The Cases Cited by Appellant Are Authority for Appellees.

Under this point appellant maintains that the cases of *In re Wogstad* and *McFarland v. West Coast Life Ins. Co.,* both cited *supra,* are authorities for her position that the hearing and report by conciliation commissioner means the hearing and report of creditors' claim and hearing on extension. We adopt the argument and authorities presented under Point III of our brief in answer to this point of appellant's brief.

VI.

Reply to Appellant's Argument, Point II, Page 12 of Her Brief. Under This Point, Appellant Fails to Distinguish Between the Authorities in Support of General Bankruptcy Law and the Special Act of Bankruptcy Known as Frazier Laemke Proceedings.

Appellant's cases, cited under this point, do not aid her. The case of *Harrison v. Chamberlain,* 271 U. S. 191, cited by appellant, does not apply. In that case, the *bankruptcy trustee filed a petition for summary order requiring* Mrs. Chamberlain, *a stranger to the proceeding,* to deliver up to him certain money *in her possession,* which he claimed she held fraudulently from the bankrupt. Our case is entirely different, in that the so-called adverse claimant (appellant) admits appellees are using the water, and are in possession, of the water on their own land, and claim ownership in and to the right to use the water. That the State Court proceeding is one to enjoin the trespass, quiet her title and recover money damages. (App. Br. p. 20.) The law enunciated, is in our favor. The Court there said:

> "HOWEVER, *the court is not ousted of its jurisdiction by the mere assertion of an adverse claim;* but having power in the first instance to determine whether it has jurisdiction to proceed, *the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. If found merely colorable the court may then proceed to adjudicate the merits sum-*

marily; if found to be real, and substantial, it must decline to determine the merits and dismiss the summary proceedings."

That is our position, precisely. The lower court said: "Our minds are not together, Mr. Clark. I am not prepared to dispute the verity of what you say. I am talking about a forum to try the issues. You are talking about the merits of an issue." [Tr. pp. 61-62.] "I am referring petition of Peck to conciliation commissioner with plenary powers . . ." [Tr. p. 69.]

We have heretofore cited authorities showing the conciliation commissioner has authority to hear and determine the matter contained in said petition. The *Harrison* case cited by appellant is authority that appellant's assertion in her petition that she is an adverse claimant does not oust the Court of jurisdiction and we again reiterate that the appeal is premature; it should not have been taken until after the hearing and report by conciliation commissioner.

Appellant next cites, and lays great stress on the case of *Louisville v. Cominger,* 184 U. S. 413, as sustaining her position. In that case the referee *entered an order against adverse claimant without notice to adverse claimant.* The referee on his own motion made an order requiring Cominger to show cause why he should not pay over money in his possession. At that time *money was in Cominger's possession, and Cominger claimed adversely to bankrupt. The referee and judge both passed upon*

Cominger's claim as being adverse to bankrupt estate. Under these facts, the law quoted by appellant on top of page 13 of her brief, is authority. But the remainder of the legal holdings enunciated in that case favor appellees. The case cites, with approval, *Mueller v. Nugent,* 184 U. S. 1, and says:

> "The district court has power to ascertain whether in the particular instance the claim asserted is an adverse claim existing at the time petition was filed. And according to the conclusion reached, the court will retain jurisdiction or decline to adjudicate the merits."

Is this not what the lower court did in the case at bar? It endeavored to ascertain whether in the particular instance the claim of appellant was adverse, but this appeal was taken, before this could be done.

Appellant quotes at great length from *Dannell v. Wilson-Wiemer-Wilkinson,* 109 F. (2d) 364, which case cites with approval a well discussed case, *Straton v. New,* 283 U. S. 318. Appellant also quotes from the *New* case, which cites with approval a decision by this Circuit, the case of *In re Maier Brewing Co.,* 65 F. (2d) 673. These cases are all similar to each other, and all cited in support of appellant's argument Point II.

We will not differentiate these cases from the case at bar, other than to *cite authorities specifically overruling Straton v. New, supra,* and all similar cases, in so far as Frazier Laemke proceedings, and appellees' petition is concerned.

In *Hoyd v. City Bank of Albany Co.* (C. C. A. 6th), decided March, 1937, which was a Frazier Laemke proceeding, reported in 89 F. (2d) 105, the Court said, at page 108:

> "As to Appellees' contention that the state court has exclusive jurisdiction of the foreclosure proceedings, *we do not consider that Straton v. New, 283 U. S. 318 and similar decisions are here controlling.* It cannot be doubted that the congress when acting within its valid legislative powers has power under the bankruptcy clause of Article 1, Sec. 8, U. S. Constitution, to stay proceedings instituted at any time prior to the filing of the petition under this section (11 U. S. C. A. Sec. 203(o)) it governs the foreclosure proceedings in the instant case." (Italics ours.)

The case of *Kalb v. Feurstein,* cited *supra* under Point I-A, and briefed at great length, substantiates and follows the holding laid down in the *Hoyd* case, and by its holding, overrules the *Straton v. New* and similar decisions. It appearing that the remainder of the authorities cited in appellant's brief from page 15 to and including page 16, where Point III is set out in appellant's brief are similar to, and based upon *Straton v. New,* they too are overruled and do not affect appellees' position.

VII.

Reply to Appellant's Argument, Point III, Page 16 of Her Brief.

Under this point, appellant cites *In re Cadillac Brewing Co.,* 102 F. (2d) 369, and *Louisville v. Cominger,* 184 U. S. 18. These cases were discussed by appellees in Point VI of their brief, and the cases cited therein by appellees to that point, dispose of the question raised by appellant in favor of appellees.

VIII.

Reply to Appellant's Argument, Point IV, Page 17 of Her Brief. Under This Point Appellant Admits the Jurisdiction Is in the Bankruptcy Court.

Under this point, appellant contends that since her action in the State Court, which was stayed by the bankruptcy court, was one to quiet title for money damages, and to enjoin trespass that a bankruptcy court will not stay a State Court, and cites *In re Franks* and *In re Gumbransky.*

By admitting she is attempting to quiet title to the water right, she recognizes appellees as claiming ownership (which she is endeavoring to show is inferior to her title). By admitting she seeks to restrain appellees' use of the water, she admits they are in possession of the water and using it.

We do not believe we need go further to show jurisdiction is in the Federal Court under the holdings of *Kalb v. Feurstein, supra, Hoyd v. City Bank, supra,* and the cases cited under argument, Points I, I-A, and I-B of appellees' brief.

IX.

Reply to Appellant's Argument, Point V, Page 18 of Her Brief.

We can dispose of appellant's argument under this heading by citing all cases under argument, Points I, I-A, and I-B of appellees' brief.

X.

Reply to Appellant's Argument, Point VI, Page 20 of Her Brief.

We have no quarrel with law as laid down in *Tullis v. Pratt,* cited by appellant under this point. The evidence conclusively shows, from the record, as well as by appellant's own admissions in her brief (Brief p. 17) that we are in possession of the water right, and using it.

Appellant asks the question whether or not her suit against appellees in the State Court falls under any of the Subdivisions 1-6 of Sub. (o). Appellant admits her action is one to restrain trespass, quiet title, and for money damages. This question can be readily answered in the affirmative, under the authorities heretofore cited in our argument, Point III of appellees' brief.

Conclusion.

The issues involved in this appeal are not at all difficult of solution. The case is clearly one in which appellant seeks to establish her status as an adverse claimant, without first permitting inquiry to be made to determine if she is an adverse claimant, and then proceeds on the happy solution that by stating in a petition that she is an adverse claimant, has the right to proceed in the State Court on the theory the Court has no jurisdiction to try the matter in a summary proceedings nor in a plenary suit, without her consent.

Appellant overlooks one requirement, necessary to sustain her position. That is "possession of the res".

In re Logan, 196 F. 678, the Court says:

> "The bankrupt may be compelled summarily to deliver to the trustee of his estate property which such bankrupt owns and owned at the time of the adjudication, *and has in possession and the title to which, with the right of possession passes to* the trustee on his appointment by operation of law."

In *Mound Mines Co. v. Hawthorne,* 173 Fed. 882, the Court held:

> *"When a third party has record title by deed from a fourth party to real property which belongs to the trustee (bankrupt and trustee both being in possession) the court or referee may make an order in a summary proceeding and without resort to plenary action to compel* the execution and delivery of a deed by such third person *when the real estate has come into the actual possession of the trustee."*

"The test of jurisdiction to proceed by summary proceeding to determine controversies in *regard to real or personal property is possession of property in or by the bankrupt at time of filing petition.* Property comes within jurisdiction of Bankruptcy court and constructively in its possession, it being in possession of the bankrupt himself."

And in the case of *Isaacs v. Hobbs Tie and Timber Co.,* 282 U. S. 734, the Court said:

"Upon adjudication, title to bankrupt's property vests in the trustee with actual or constructive possession and is placed in custody of the bankruptcy court. Mueller v. Nugent, 184 U. S. 1, 14. Title and *right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy. The bankruptcy court has exclusive jurisdiction to deal with property of bankrupt estate. When this jurisdiction has attached, court's possession cannot be affected by actions brought in other courts."*

We submit to this Court that elementary principles of justice and equity invite an affirmance of that part of the order appealed from.

Respectfully submitted,

PAUL LEITER,

Attorney for Appellees.